IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0581

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SUMMER LEE MANYWHITEHORSES,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Julie Macek, Presiding

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STATEMENT OF THE ISSUE

Did the State's conduct at sentencing breach the terms of the oral plea agreement entered at the change-of-plea hearing when the State was free to recommend a persistent felony offender sentence of 100 years for the Appellant's negligent homicide conviction, and it did so?

STATEMENT OF THE CASE

On September 22, 2008, the State filed an Information charging the Appellant, Summer Lee Manywhitehorses (Manywhitehorses) with Count I, deliberate homicide, or in the alternative, negligent homicide, and Count II, tampering with physical evidence. The State gave a timely persistent felony offender notice and a timely notice of its intent to introduce other bad acts at trial. (D.C. Docs. 12, 13.)[1] The court deemed the State's first other acts notice to be inadequate, but allowed the State to give an amended notice. The State filed an amended other acts notice under seal on February 17, 2009. (D.C. Doc. 46, which represents File Number 3, in its entirety, of the district court record.)

According to its other acts notice, the State intended to introduce evidence of Manywhitehorses' past physical abuse of her young son, J.M., primarily to dispel

[1] There is no dispute that Manywhitehorses meets the definition of a persistent felony offender and the court properly sentenced her as a persistent felony offender.

Manywhitehorses' claim that her son died as a result of an accidental fall from his high chair. (D.C. Doc. 39.) The State's case was complicated by the fact that J.M.'s body was not located until several months after his death, because Manywhitehorses had secreted the body in the trunk of her car. Since J.M.'s body was so severely decomposed, it was impossible for any medical expert to determine an exact cause of death. The court denied the State's motion to introduce evidence pursuant to Mont. R. Evid. 404(b), but offered the possibility that evidence of Manywhitehorses' prior acts of striking J.M. in response to him crying may be admissible as evidence of habit. (D.C. Doc. 65.)

The State gave notice of its intention to call Dr. Wells, a pediatrician who specializes in child abuse and neglect cases. (D.C. Doc. 83.) Manywhiteshorses filed a motion in limine to prohibit Dr. Wells' proposed expert testimony that J.M. likely died from child abuse, arguing that she should be prohibited from testifying about a likely cause of death since she was not trained in forensic medicine. (D.C. Doc. 132 at 3-4.) The State responded that Dr. Wells, who is an expert in the fields of general pediatrics and child abuse, including child abuse fatalities, should be allowed to give her medical diagnosis that J.M. suffered from Battered Child Syndrome, and the injuries documented during the autopsy were non-accidental. (D.C. Doc. 148.)

After a hearing on June 2, 2009, the court concluded that the State's offer of proof regarding habit evidence was insufficient to meet the foundational requirements for such testimony. (D.C. Doc. 136 at 8.) On June 11, 2009, defense counsel moved the court to set this case for a change-of-plea hearing. (D.C. Doc. 166.) The court conducted a change-of-plea hearing on June 12, 2009. (6/12/09 Transcript of Change-of-Plea Hearing [C/P Tr.].) The parties did not execute and file a written plea agreement. At the hearing, Manywhitehorses pled guilty to negligent homicide and tampering with evidence, and after a colloquy, the court accepted her guilty pleas. (C/P Tr. at 11-17.)

Prior to sentencing, Manywhitehorses filed a motion in limine to prohibit uncharged, unproven conduct to be a significant basis of the sentence. (D.C. Doc. 184.) Manywhitehorses attached her expert witness's, Dr. Bennett's report, to the motion. Manywhitehorses denied ever physically abusing her son and claimed that Dr. Bennett's report supported her position. (Ex. A attached to D.C. Doc. 184.) The court conducted a sentencing hearing on August 12, 2009. (8/12/09 Transcript of Sentencing Hearing [Sent. Tr.].) The court ruled on Manywhitehorses' motion in limine at the beginning of the hearing and indicated that it would carefully exercise its discretion about what it would consider prior to imposing sentence. (Sent. Tr. at 4-5.)

The court designated Manywhitehorses a persistent felony offender (PFO), without objection. (Sent. Tr. at 3-4.) The State recommended that the court sentence Manywhitehorses to 100 years, as a PFO, for the negligent homicide conviction, and a concurrent 20-year sentence for the evidence tampering conviction. (Sent. Tr. at 63.) Defense counsel recommended the court sentence Manywhitehorses to a total of 20 years in prison with 10 years suspended. (Sent. Tr. at 68-69.) The court sentenced Manywhitehorses as a PFO to 40 years in prison for negligent homicide and a consecutive 15-year sentence for tampering with evidence. (Sent. Tr. at 77; D.C. Doc. 190.) Manywhitehorses filed a Notice of Appeal. (D.C. Doc. 196.)

STATEMENT OF THE FACTS

I. FACTS RELATED TO THE OFFENSES

On July 21, 2008, Officer Cobb of the Great Falls Police Department was on patrol when he saw a speeding driver fail to stop at a stop sign, lose control of her vehicle, and strike a parked car without stopping. The driver finally came to a stop, and Officer Cobb identified her as Manywhitehorses. Officer Cobb could smell a strong odor of an alcoholic beverage on Manywhitehorses' breath, Manywhitehorses was wearing a bra, but no shirt, and she was unable to provide her license, registration or proof of insurance. Manywhitehorses admitted she had

been drinking, and her 11-year-old daughter, C.M., was in the passenger seat of the vehicle. Officer Cobb arrested Manywhitehorses for DUI and numerous other misdemeanor offenses. (D.C. Doc. 1 at 2.)

After Manywhitehorses' arrest, the Department of Public Health and Human Services (DPHHS) initiated a youth in need of care action to protect Manywhitehorses' children, C.M. and J.M., age 2, the victim in the instant case. (D.C. Doc. 1 at 3.) J.M. was born on March 20, 2006, and suffered from autism. J.M. received monthly disability checks (SSI) from the federal government. The DPHHS caseworker could not locate J.M. Initially, Manywhitehorses said that J.M. was with a relative, Clarinda Gopher, in Yakima, Washington, but the authorities in Yakima did not find J.M. with this relative. (D.C. Doc. 1 at 3.)

On August 14, 2008, the youth court adjudicated C.M. and J.M. as youths in need of care. The court also ordered Manywhitehorses to advise DPHHS of J.M.'s location. Manywhitehorses then informed the caseworker that J.M. was with Gilbert Barrientos in Portland, Oregon. Barreintos, indicated, however, that J.M. had been with him for a few days, but his mother had picked him up. (D.C. Doc. 1 at 4.) On September 4, 2008, DPHHS requested that J.M. be listed as a missing child since it had been months since friends and family members had seen him. (D.C. Doc. 1 at 4-5.)

On September 5, 2008, Detective McDermott of the Great Falls Police Department interviewed Manywhitehorses concerning J.M.'s whereabouts. She again maintained he was with Barrientos. Detective McDermott again confirmed that Barrientos did not have custody of J.M. Although Manywhitehorses persisted in her story that J.M. was with Barrientos, she ultimately told Detective McDermott that J.M. was in her car, which the police had impounded after her DUI arrest on June 21, 2008. (D.C. Doc. 1 at 8-9.) Law enforcement obtained a search warrant for Manywhitehorses' impounded car, and found a child's body, approximately two years of age, tightly wrapped in a gold blanket, and stuffed into a laundry basket in the trunk of the car. The body was badly decomposed and falling apart, so the officers placed the entire blanket and body into a body bag and transported it the State Crime Lab for an autopsy and identification. (D.C. Doc. 1 at 9.)

After the officers found the body in the trunk of Manywhitehorses' car, she told Officer McDermott that on May 28, 2008, J.M. was sitting in his high chair when he jumped up and fell from the chair. Manywhitehorses said J.M. hit his head on the floor or a vent. (D.C. Doc. 1 at 11.) J.M.'s eyes rolled back and Manywhitehorses thought "oh my god they're going to think it was me." (D.C. Doc. 1 at 10.) Manywhitehorses said she laid J.M. on the couch and his eyes rolled back. She was scared and thought she should call an ambulance but did not do so.

J.M. went to sleep and she thought he would be all right. The next morning, she discovered that he had stopped breathing, and she got scared that she was going to get in trouble because she did not call for help right away. (D.C. Doc. 1 at 12.)

Later that day, Manywhitehorses said she wrapped J.M. in a blanket, put his dead body in a laundry basket and put the laundry basket in the trunk of her car. (D.C. Doc. 1 at 14.) Detective McDermott later learned, however, that on May 29, 2008, Manywhitehorses did not own a car. Manywhitehorses did not purchase the red Taurus until June 4, 2008. (D.C. Doc. 1 at 15.)

Law enforcement learned that Manywhitehorses cashed J.M.'s June SSI check, in the amount of $637.00, on June 3, 2008. Manywhitehorses also cashed J.M.'s SSI checks for the months of July and August. On July 9, 2008, a surveillance video tape at EZ Money Check Cashing, captured Manywhitehorses cashing J.M.'s July SSI check. On July 14, 2008, Manywhitehorses reported to the Social Security Administration that she had never received the July check, and the Administration issued a substitute check. (D.C. Doc. 1 at 19.) Manywhitehorses cashed the substitute check at Wal-Mart on July 28, 2008. (D.C. Doc. 1 at 20.)

After retracing all of Manywhitehorses' movements from the time of J.M.'s death until her arrest for DUI, officers believed that J.M.'s dead body remained in Manywhitehorses' trailer from May 29, 2008, until June 11, 2008, although Manywhitehorses and C.M. traveled to Missoula and Browning and also stayed at

local motels after J.M.'s death. Law enforcement believed that Manywhitehorses placed J.M.'s body in the trunk of the Taurus on June 11, 2008, and that is where the body remained until officers discovered it on September 5, 2008. (D.C. Doc. 1 at 18-22.)

Dr. Kemp of the State Crime Lab completed an autopsy of J.M.'s body. He could not determine the cause of death, because of the advanced decomposition of the body. Dr. Kemp found past injuries to the skull and left upper extremity. He concluded that J.M.'s poor state of health, in combination with Manywhitehorses' post mortem treatment of J.M. was suggestive of non-accidental trauma as a cause of the injuries. J.M. had a healing fracture on the back portion of his skull. Complications from skull fractures can cause a delayed death. Due to the condition of J.M.'s body, however, Dr. Kemp could not determine that the skull fracture caused J.M.'s death. Dr. Kemp also found that J.M. suffered from severe tooth decay including an abscessed tooth. (D.C. Doc. 55 at 25-26.)

II. FACTS RELATED TO THE CHANGE OF PLEA HEARING

The parties did not execute a written plea agreement. At the change of plea hearing, Manywhitehorses testified as to her understanding of the State's agreement: that if she pled guilty to negligent homicide and tampering with evidence, the State would not pursue any other charges against her and would

recommend a 20-year sentencing for tampering with evidence to run concurrent to whatever the State recommended for the negligent homicide conviction. (C/P Tr. at 4.) She further acknowledged that she understood that on the negligent homicide conviction the State could ask for up to the maximum sentence under the PFO statute, and that she could advocate for whatever sentence she felt appropriate. (C/P Tr. at 4-5.) Manywhitehorses affirmed her understanding that the sentence was left to the discretion of the district court. (C/P Tr. at 5.)

The court also questioned Manywhitehorses as follows:

> THE COURT: The state has filed a persistent felony offender designation against you, and if, in fact, that's proven at the time of sentence, then the Court could sentence you pursuant to the persistent felony offender statute to a minimum of five years and to a maximum of 100 years. Do you understand that would be the maximum sentence the Court could impose?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Even though the maximum for negligent homicide is 20 years, do you understand that as well.
>
> THE DEFENDANT: Yeah.
>
> THE COURT: And you understand that the maximum sentence for a tampering charge without the persistent felony offender designation is a ten-year sentence?

(C/P Tr. at 13.)

The court asked Manywhitehorses about her understanding of what the State intended to recommend at sentencing and she responded, "For tampering and

negligence to run concurrent and that there's – it's all up to the judge, my sentence, pretty much." (C/P Tr. at 16.) The court then engaged in the following dialogue with Manywhitehorses:

> THE COURT: All right. You understand this is what's called an open plea, in other words, there's no limit to what the state could come in and recommend other than they can't go higher than what the maximum punishment is here and that your counsel is free to make any recommendation that he wishes to make on this negligent homicide charge, do you understand that?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: And that the understanding or agreement on the tampering charge is that the state is going to recommend a 20-year sentence, to run that time concurrent, meaning at the same time, as your negligent homicide charge?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: Do you have any questions about that?
>
> THE DEFENDANT: No.

(C/P Tr. at 16.)

Manywhitehorses admitted that on May 28 or 29, 2008, when her son "went into distress" she should have called for an ambulance, she chose not to do so and J.M. ultimately died. Manywhitehorses believed his death may have been avoidable if she had promptly called for help. She also admitted that she concealed her dead son's body in the trunk of her car until September, 2008, even though she knew that law enforcement and DPHHS was looking for him. (C/P Tr. at 5-7.)

III. FACTS RELATED TO THE SENTENCING HEARING

The State called two witnesses to testify at the sentencing hearing – Detective McDermott and Dr. Wells. (Sent. Tr. at 7-34, 36-55.) During Detective McDermott's testimony, the State moved to admit Exhibits 1 through 12 taken when officers found J.M.'s decomposed body in the trunk of Manywhitehorses' car, without objection. The court admitted the exhibits. (Sent. Tr. at 10-17; State's Exs. 1-13.)

Detective McDermott testified about how law enforcement discovered J.M.'s body; the condition of the body; the putrid smell emanating from Manywhitehorses' car; the fact that C.M. was repeatedly exposed to the smell of her brother's dead body in the trunk of her car; the fact that Manywhitehorses solicited C.M. as a lookout when she placed J.M.'s body in the trunk and later solicited C.M.'s help in finding a place to bury the body; that after J.M.'s death, Manywhiteohorses continued to cash J.M.'s SSI checks and that Manywhitehorses repeatedly lied to law enforcement and DPHHS about J.M.'s whereabouts. (Sent. Tr. at 17,19, 31.) Manywhitehorses did not object to any of this testimony. (Id.)

When the State questioned Detective McDermott about statements he took from witnesses who reported that Manywhitehorses had physically abused J.M. in the past, the court interjected its concerns that such testimony was not relevant to

Manywhitehorses' conviction for negligent homicide. (Sent. Tr. at 21.) The prosecutor responded:

> So we are relying on that body of case precedent which grants the Court very broad authority to analyze the defendant's character including uncharged conduct. And we want to bring that to the attention of the Court because we know the Court does have the ability to look at the full picture of the horrifying child abuse that this defendant rendered not only against her son that died but even against her daughter who is still alive, and it's our hope that the Court is going to take stock of that entire picture today.

(Sent. Tr. at 22.)

The dialogue continued:

> THE COURT: But the question is what's relevant to come into court at the time of this sentencing hearing. And so I have grave concerns that this record, if we litter it with other instances of alleged abuse that cannot be correlated to the autopsy findings regarding these injuries to the child, which no one can. I mean, there has been nothing that's been presented to this Court that indicates that this defendant caused these injuries. We have the injuries. We have prior instances of conduct by the defendant. But there's no linkage that anyone can provide this Court to conclude then that A equals B.
>
> MR. PARKER: Sure. Now, Your Honor, another way to approach this is through the lens of the evidence tampering. And I mean at the outset I want to state I don't believe we're littering the record. I believe that everything we've elicited thus far is admissible under State versus Hill but let's analyze it through the evidence tampering standpoint.
>
> As the Court just mentioned nobody knows exactly how and why [J.M.] died. Point number two, and the Court is referencing the body of evidence that's already in the record, Dr. Kemp's testimony and his report that's on file with the Court indicates the reason no one can identify that is due to the advanced state of decay.
>
> And as has been referenced prior all that the crime lab could look at were skeletalized remains with injuries at different rates of

> healing. The internal organs were essentially gone. The crime lab could not analyze any soft tissue injuries because all the soft tissue was gone. Why was it gone, because the defendant evidence tampered.
>
> THE COURT: Well, and I agree, and I think all of that is relevant.

(Sent. Tr. at 27-29.)

The Court went on to express its concern that the sentencing hearing not be transformed into a trial on the charge of deliberate homicide since that charge was no longer before it. The Court cautioned the State not to come through the back door to put on testimony pertinent to deliberate homicide. (Sent. Tr. at 30.) The State assured the Court that this was not its intent. (Sent. Tr. at 30.) The State abandoned its questioning regarding the witnesses' statements of Manywhitehorses' past physical abuse of J.M., and shortened his questioning of Detective McDermott. Manywhitehorses did not object to any of the remaining questions the prosecutor asked Detective McDermott. (Sent. Tr. at 30-32.)

The State next called Dr. Wells, a pediatrician, who specializes in child abuse and neglect. She explained her work differs from that of a forensic pathologist as follows:

> As a child abuse pediatrician I focus more on patterns of injury, mechanisms of injury, and ruling out other medical incidents that could explain particular injuries, so that would be in a child that's either a surviving child, a live child and I also then would assist in cases of fatalities in trying to help differentiate injuries that may have been- -may have occurred due to some other medical illness or also an accidental injury, also give opinions regarding what a child is capable

> of doing, you know, depending upon their developmental level, so really focused more on the pediatric aspect and relating it to normal childhood behavior, development, and disease.

(Sent. Tr. at 36-37.)

Defense counsel agreed that Dr. Wells was qualified as an expert witness, but objected to her testimony, because it had no relevance to the negligent homicide conviction. (Sent. Tr. at 41.) The court indicated that it could not rule on the objection until it heard from the witness. (Sent. Tr. at 41.) Dr. Wells then catalogued everything she reviewed from the record and summarized the injuries she found that J.M. sustained as follows:

> So he had evidence of some new and old injuries. He had evidence of a fracture of his right maxilla which was acute or recent. That's the upper jaw bone. He also had evidence of a star shaped or complex or what we call stellate fracture of the back of his head or occipital bone on the right side. He had – and that was healing. He had evidence of a healing fracture to the left humerus or his upper arm bone. And he also had other evidence of neglect such as dental decay, dental abscesses, and then areas of multiple locations of periostitis which is inflammation of the fibrous tissue around the bones which would signify very poor nutrition.

(Sent. Tr. at 43.)

Dr. Wells explained that after an exhaustive review of all the records she believed that J.M.'s skull fracture, in light of all of his injuries and the lack of any other significant history, was more consistent with child abuse than with the explanation that he fell out of the highchair. (Sent. Tr. at 44-45.) One way or another, however, she explained that because J.M. sustained a massive fracture to

the back of his head, his signs of distress and need for prompt medical intervention would have been readily apparent. He most likely had some change in his level of consciousness, and possibly had seizures and vomiting. (Sent. Tr. at 48.)

Dr. Wells stated that Manywhitehorses' acts of failing to call for help and secreting her son's dead body for several months impaired the experts' ability to determine an actual cause of death. Dr. Wells explained, however, that based upon what she could review:

> It was my expert medical opinion that he [J.M.] was the victim of chronic child physical abuse including emotional abuse and neglect, which we commonly called the battered child syndrome. Further, it was my opinion that his death was very likely the result of child physical abuse given the nature of the -- the presentation and what was described, and that was compounded by medical neglect and his mother's action in [not] seeking any medical care for him and further placing him in a laundry basket in the trunk of a car, I felt really contributed to the display of true disregard for human life.

(Sent. Tr. at 51.)

Manywhitehorses did not call any witnesses to testify at the sentencing hearing, but she submitted Dr. Bennett's report to the court in advance of the sentencing hearing, offered it as an exhibit at the hearing and asked the court to consider it prior to imposing the sentence. (Sent. Tr. at 55-56; See Ex. A attached to D.C. Doc. 184.)

When the State began to give its sentencing recommendation, defense counsel interjected the following objection:

> The objection is this, Your Honor: As far as I can see, this alleged child abuse, which we argue did not occur for the most part by our client, by my client, is- -is that that would still, if anything, go towards the tampering evidence or towards deliberate homicide, so it is bootstrapping, and it would be undermining. There is actually a plea agreement in place in regard to the tampering charge, and I'm thinking the way the state is portraying this that they're saying don't follow that clearly which is a violation of the law clearly.

(Sent. Tr. at 57.) The court responded:

> Well, I have not yet heard their recommendations for the tampering charge to see if that complies with the plea agreement, but I will let the state make their arguments, and then I will tell you what I can- -believe I can consider and what I can't consider, as far as the Court's sentencing determination, and I'll put that on the record as well, Mr. LaFountain.

(Sent. Tr. at 57.)

The State concluded its remarks at sentencing as follows:

> In closing, Your Honor, the bottom line is the Court does have broad latitude within the statutory parameters to hold this defendant accountable for what she has done. This case reflects atrocious negligence beyond the scope of what most in our community can even relate to. This is a case about a baby who didn't have to die. We are asking the Court to act decisively today on behalf of [J.M.] because he's not here to speak for himself. We ask this Court to weigh in on behalf of [C.M.] because she won't have her little brother there for birthdays, for Thanksgiving, for Easter, and Christmas because she had to ride in a car carrying his decaying remains for three months. Clearly it was psychologically devastating, and it will be for the rest of her life.
>
> For all these reasons taken together, we're moving the Court to impose a term for Count I of negligent homicide of 100 years in the Montana Women's Prison. For Count II, we move the Court to impose a concurrent 20-year term to the Montana Women's Prison, again on evidence tampering. It's been insinuated that we're seeking a deliberate homicide sentence here. We're not. If this was a

> deliberate homicide I'd be seeking 100 years on each count with no possibility of parole, but that's not my recommendation.

(Sent. Tr. at 62-63.)

Defense counsel argued that his client should get nothing more than a 20-year sentence with 10 years suspended. He stated that "takes into account the persistent felony offender statute. Probably takes more than that into account." (Sent. Tr. at 68.)

Prior to imposing sentence, the district court did a thorough review of the pertinent evidence and information before it, and the correctional and sentencing policies of the State of Montana. (Sent. Tr. at 69-77.) The court concluded that even though it was sentencing Manywhitehorses as a PFO, a 100-year sentence for negligent homicide was too harsh compared to the sentences other persons convicted of negligent homicide received. (Sent. Tr. at 15-76.) Nonetheless the court remarked:

> The Court is also required to consider aggravating and mitigating circumstances. The Court finds there are aggravated circumstances in regards to the negligent homicide charge. The defendant was the mother of a two-year-old child who relied exclusively upon her mother, his mother, to protect and care for him. When this child was in severe distress, she did not call an ambulance, did not get him to a medical facility, did not personally provide him with appropriate medical care, although there was absolutely no doubt that the child was in [a] severe and serious condition. She essentially put him to bed, let him suffer through the night, until he expired in the morning.
>
> There are also aggravating circumstances in regards to the tampering with physical evidence charge. The defendant not only did

> not report the death but intentionally hid the child from the authorities, lied about his location, and asked others to lie for her. She did not divulge his location until three months after his death when questioned by the police. To make this even more egregious she cashed his disability checks after his death.
>
> The Court also finds that the defendant is a repeat felony offender and as part of the sentencing requirements [of] the state of Montana is to be punished with incarceration and held responsible for her actions.

(Sent. Tr. at 76-77.)

SUMMARY OF THE ARGUMENT

The State bargained in good faith with Manywhitehorses when it agreed to accept her guilty plea to negligent homicide rather than deliberate homicide and it agreed to recommend a 20-year sentence for tampering with evidence to run concurrent to the negligent homicide sentence. By accepting the benefit of the agreement, Manywhitehorses was assured that the maximum sentence she could receive was 100 years as a persistent felony offender. Under the circumstances, that was about as good an outcome as she could have hoped. The State kept its promises, but Manywhitehorses now attempts to transform a simple, oral plea agreement into something more than the parties ever intended.

The State was free to recommend up to a 100-year sentence for negligent homicide, and it did not breach the plea agreement by making and supporting this recommendation. The facts of this case, regardless of whether Manywhitehorses ever physically abused her young son in the past, are horrific, and the State

appropriately commented on those facts. Despite the State's recommendation, Manywhitehorses fared even better than she could have hoped, because the district court sentenced her to 40 years in prison for negligent homicide and a consecutive 15-year sentence for tampering with evidence. Even the sentence the court imposed demonstrates that Manywhitehorses reaped the benefit of the plea agreement, and this Court should affirm her convictions and sentence on appeal.

ARGUMENT

THE PROSECUTOR ABIDED BY THE TERMS OF THE ORAL PLEA AGREEMENT, AND WAS FREE TO PRESENT EVIDENCE AND ARGUMENT TO SUPPORT HIS RECOMMENDATION THAT THE COURT SENTENCE MANYWHITEHORSES TO 100 YEARS AS A PFO.

I. THE STANDARD OF REVIEW

A plea agreement is a contract and is subject to contract law standards. State v. Hill, 2009 MT 134, ¶ 49, 350 Mont. 296, 207 P.3d 307. The question of whether a contract was breached is a question of law which this Court reviews de novo. State v. Shepard, 2010 MT 20, ¶ 8, 355 Mont. 114, 225 P.3d 1217.

II. THE STATE WAS FREE TO RECOMMEND UP TO 100 YEARS FOR NEGLIGENT HOMICIDE AND DID NOT BREACH THE PLEA AGREEMENT BY MAKING THIS RECOMMENDATION.

A. Introduction

A plea agreement is a contract between the State and a defendant. The State may not retain the benefit of such an agreement while avoiding its obligations. State v. Bartosh, 2007 MT 59, ¶ 19, 336 Mont. 212, 154 P.3d 58. As such, it is "unacceptable for a prosecutor to present information and to aggressively solicit testimony that is clearly intended to undermine the plea agreement and to convince the sentencing court that a plea bargained sentence recommendation should not be accepted." Bartosh, ¶ 19, citing State v. Rardon, 2005 MT 129, ¶ 18, 327 Mont. 228, 115 P.3d 182, (Rardon III). However, "there are no hard and fast criteria that define when a prosecutor has merely paid lip service to a plea agreement as opposed to when a prosecutor has fairly presented the State's case. Each case stands or falls on the facts unique to it." Bartosh, ¶ 19, citing State v. Rardon, 2002 MT 345, ¶ 21, 313 Mont. 321, 61 P.3d 132 (Rardon II).

B. Discussion

Manywhitehorses argues that the State breached the plea agreement, first by merely paying lip service to the oral agreement and second by offering "inflammatory evidence" that emphasized the sentencing aggravators. The State dismissed the deliberate homicide charge, so it clearly kept its promise in that

regard. Further, since the State was not bound to any specific recommendation for the negligent homicide conviction, and since Manywhitehorses is a PFO, the State could recommend up to a 100-year sentence and was free to present evidence and argument to support its recommendation of 100 years.

1. The Unique Facts of the Case Demonstrate the Prosecutor Fairly Presented the State's Case in Accord With the Plea Agreement.

A sentencing court may consider "any matter relevant to the disposition" of an offender. Mont. Code § 46-18-115(1). This Court's cases firmly establish that a sentencing court may consider any relevant evidence relating to the character of the defendant, her history, her mental and physical condition, and the broad spectrum of incidents making up her background. This includes other acts, even those which are dismissed pursuant to a plea agreement. Hill, 2009 MT 134, ¶ 31, citing State v. Mason, 2003 MT 371, ¶¶ 23-25, 319 Mont. 117, 82 P.3d 903, overruled on other grounds, State v. Herman, 2008 MT 187, 343 Mont. 494, 188 P.3d 978.

In considering the facts unique to the instant case, it is important to bear in mind that the State was free to make any recommendation, within statutory parameters, it deemed appropriate on the negligent homicide conviction. Because it is not disputed that Manywhitehorses is a PFO, the State was free to recommend up to a 100-year sentence for the negligent homicide conviction and offer

argument and evidence to support that sentence. In fact, the district court made this fact very clear to Manywhitehorses at the change of plea hearing. This is not a case where the maximum sentence the State could recommend for negligent homicide was 20 years, and that is a fact unique to this case, when determining whether the prosecutor fairly presented the State's case.

Manywhitehorses claims, however, that the State violated the oral plea agreement when it offered evidence that witnesses had observed Manywhitehorses physically abuse J.M. in the past. As previously set forth, during Detective McDermott's testimony at the sentencing hearing, once the court voiced its concern about the relevance of what the detective learned during his investigation from witnesses who observed Manywhitehorses physically abuse J.M. in the past, the State abandoned this line of questioning, even though, based upon this Court's reasoning in Hill, it was not necessary for the State to do so. (See Sent. Tr. at 30-32.)

Further, Manywhitehorses makes much of the prosecutor's 404(b) notice, and how that demonstrates the State's belief that Manywhitehorses was guilty of deliberate homicide. The content of the State's 404(b) notice cannot constitute evidence of a plea agreement breach, and the notice is irrelevant to the issue Manywhitehorses has raised. Further, the State obviously believed that Manywhitehorses was guilty of deliberate homicide, because it originally charged

that offense while offering the alternative charge of negligent homicide. As a result of Manywhitehorses' own conduct, the State was caught between a rock and a hard place. While the State clearly believed that Manywhitehorses inflicted the blows that ultimately led to J.M.'s death, the State could not prove an actual cause of death because Manywhitehorses secreted J.M.'s body until it was severely decomposed. Thus, the parties reached a plea agreement. The State did not, however, forego the right to zealously advocate for a 100-year sentence.

Manywhitehorses also claims that, when the State presented Dr. Wells' testimony, it also breached the plea agreement because Dr. Wells believed that J.M. suffered from Battered Child Syndrome and, even though as a result of the decayed condition of J.M.'s body, no one could determine the exact cause of death; she did not believe the injuries he sustained could be explained from a short fall out of a high chair- -the only explanation Manywhitehorses ever provided. Battered Child Syndrome is a medical diagnosis. See, e.g., State v. Taylor, 163 Mont. 106, 120, 515 P.2d 695, 703 (1973); State v. Tanner, 675 P.2d 539, 541-50, (Utah 1983) citing People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (Cal. App. 1971); State v. Faufata, 66 P.3d 785 (Haw. Ct. App. 2003); People v. De Jesus, 389 N.E.2d 260, (Ill. App. Ct. 1979); Bludsworth v. State, 646 P.2d 558 (Nev. 1982); State v. Goblirsch, 246 N.W.2d 12 (Minn. 1976); State v. Wilkerson, 247 S.E.2d 905 (N.C. 1978); Ashford v. State, 603 P.2d 1162 (Okla. Crim. App.

1979); State v. Mulder, 629 P.2d 462, 463 (Wash. App. 1981)). Dr. Wells presented that diagnosis at sentencing, but she did not offer testimony that Manywhitehorses intentionally killed her son. Rather, she offered testimony that, in J.M.'s short life, the evidence his decayed body left behind indicated he was a child abuse victim.

Further, Dr. Wells' testimony did not undermine the factual basis of the guilty plea as Manywhitehorses suggests. The factual basis of Manywhitehorses' guilty plea to negligent homicide is that her son sustained a serious head injury, either due to a fall from a high chair or some other explanation. It is not disputed, however, that J.M. sustained the serious injury and showed obvious signs of distress requiring medical attention. Dr. Wells confirmed that, based on the nature of J.M.'s skull fracture, his signs of distress and his need for medical intervention would have been obvious. (See Sent. Tr. at 47-48.) This testimony supports the factual basis of Manywhitehorses' guilty plea. Further, Dr. Wells' opinion regarding the believability of Manywhitehorses' explanation for J.M.'s injuries in the first instance, does not change the fact that once those injuries occurred, Manywhitehorses did not get him the medical attention he desperately needed.

In this regard, Manywhitehorses attempts to liken her case to the circumstances in State v. LaMere, 272 Mont. 355, 900 P.2d 926 (1995) and State v. Rardon, 2002 MT 345, 313 Mont. 321, 61 P.3d 132 (Rardon II). The

comparison is one of contrast rather than similarity. In LaMere, the State and LaMere reached a plea agreement whereby LaMere pled guilty to felony theft and misdemeanor theft, and the State agreed to recommend a deferred imposition for the felony theft and a six-month suspended sentence for the misdemeanor theft. LaMere, 272 Mont. at 356, 900 P.2d at 927.

At the sentencing hearing the prosecutor emphasized that LaMere spent most of his time drinking and bragging about getting drunk, is educated in carpentry but does not want to work as a carpenter, and is chemically dependent but refuses to go to treatment. LaMere, 272 Mont. at 357, 900 P.2d at 927-28. This Court concluded that the State's presentation at the sentencing hearing seemed to conflict with the State's recommendation for a deferred imposition of sentence. Id., 272 Mont. at 359-60, 900 P.2d at 929.

In LaMere, the prosecutor agreed to recommend the most lenient sentence possible. It therefore was incongruent for the prosecutor to appear at sentencing and offer only negative evidence in support of such a lenient sentence. Obviously, in the instant case, the State was free to recommend whatever sentence it deemed appropriate, up to 100 years, for the negligent homicide conviction. Under the circumstances of this case, it is quite understandable that the State deemed a 100-year sentence to be appropriate.

In Rardon II, the parties reached a plea agreement whereby Rardon agreed to plead guilty to sexual assault and the parties agreed to abide by the sentence recommended in the presentence investigation report (PSI). The PSI recommended a 40-year sentence with 20 years suspended. Rardon II, 2002 MT 345, ¶¶ 4-5. At the sentencing hearing, the prosecutor called Rardon's daughters and estranged wife to testify. They expressed their fear of Rardon and their desire that he be incarcerated for the rest of his life. The prosecutor expressed his belief that Rardon deserved a lengthy sentence, and then recommend that the court sentence him to 40 years in prison with 20 years suspended. Rardon II, ¶ 10. The court sentenced Rardon to 75 years in prison with 25 years suspended. Rardon II, at ¶ 12.

On appeal, this Court concluded that the prosecutor only paid lip service to the letter of the plea agreement while aggressively soliciting inflammatory testimony from the victims as to the length of the sentence and what they thought of the prosecutor's recommendation. The prosecutor also tried to get Rardon to admit that he should remain in prison until his grandchildren were grown. Rardon, 2002 MT 345, ¶ 19. Further, during the prosecutor's summation preceding his recommendation, he emphasized the negative aspects of Rardon's sexual offender evaluation, including the evaluator's observation that Rardon's resentment could culminate into acts of brutal hostility. The prosecutor then recommended a 40-year

sentence with 20 years suspended. Rardon II, ¶ 20. Based upon the record before it on appeal, this Court concluded that the prosecutor's questions of the victims to solicit testimony about their fears of Rardon and their belief that he should receive a life sentence, was designed to undermine its own recommendation of 40 years with 20 years suspended. Rardon II, ¶ 22.

Once again, in the instant case, similar to the circumstances before this Court in State v. Hill, the prosecutor did not bind himself to a specific recommendation for the negligent homicide conviction. Manywhitehorses could have negotiated a different plea agreement, but she did not do so. See, e.g., Hill, 2009 MT 134, ¶ 30. Manywhitehorses should not have been surprised by the prosecutor's recommendation of a 100-year sentence as a PFO, and the evidence he presented to support that recommendation. The degree of negligence in this case, irrespective of whether Manywhitehorses had ever hit or neglected J.M. prior to the events on May 28, 2008, far surpasses that seen in most any negligent homicide case. Manywhitehorses knew her son was gravely injured, to the point of his eyes rolling back into his head and being non-responsive, but her first concern was what emergency responders would think of her if she called for help. She was concerned they would think she had harmed her son.

Thus, Manywhitehorses allowed her two-year-old son to worsen and suffer until the next morning when he had expired. J.M. was totally dependent upon his

mother; she was his only chance to survive, but she chose not to give him that chance, purportedly because she did not want to look bad. Once J.M. died, Manywhitehorses indicated that she then did not call the authorities because she was afraid they would judge her for not calling for help sooner. Thus, she hid his body in the trunk of her car and then continued to cash his SSI checks.

Montana Code Annotated § 46-18-115(4) mandates that a victim be allowed to present a statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, and the manner in which the crime was perpetrated. The subsection contemplates that the victim is alive and competent to provide such testimony. In the case of a homicide, where the victim cannot present such testimony, it is still important for the court to consider these matters. It is incumbent upon the prosecutor to speak on the victim's behalf, so long as it does so in a manner that does not breach the plea agreement. Regardless of whether Manywhitehorses ever physically abused J.M., her treatment of him, both when he was alive and after he died, was inhumane and appropriate for the court's consideration prior to imposing sentence.

In the instant case, there is no written plea agreement, which is yet another unique factor. The sum total of the State's promises to Manywhitehorses is that if she pled guilty to negligent homicide and tampering with evidence, it would recommend a 20-year sentence on the tampering with evidence conviction. The

State did not agree to forego calling witnesses or presenting argument, and it was free to recommend up to 100 years for the negligent homicide conviction. Thus, when the State spoke on J.M.'s behalf and advocated for a 100-year sentence, it did not breach the plea agreement.

Manywhitehorses next argues that when the prosecutor argued that, but for Manywhitehorses' conduct of hiding her son's body in the trunk of her car for several months, it probably could have proven a cause of death, the prosecutor tried to get in evidence of deliberate homicide through the evidence tampering charge, and thereby undermined its agreement to recommend 20 years for the evidence tampering conviction. Manywhitehorses' decision to first deny her son medical care, and second to hide his body in the trunk of her car for several months cannot be tidily bundled in separate boxes. The State did not violate the plea agreement by referencing Manywhitehorses' conduct not only the day her son died, but during the several months following his death. The district court correctly determined and considered that it was a direct result of Manywhitehorses' evidence tampering that no expert could determine J.M.'s cause of death, thereby making the charge of deliberate homicide much more difficult to prove.

2. The State Referenced Appropriate Evidence at Sentencing Relevant to Manywhitehorses' Character and Conduct, and Manywhitehorses Did Not Object to Such Evidence.

Manywhitehorses also claims that the State breached the plea agreement by offering inflammatory testimony at the sentencing hearing. For example, Manywhitehorses suggests wrongdoing on the part of the prosecutor for introducing "gruesome" photographs. Defense counsel, however, specifically stated that he had no objection to the admission of the photographs. In fact, defense attempted to use the photographs to discredit the State's conduct. (See Sent. Tr. at 32-34.) A party waives the right to appeal an alleged error when the appealing party acquiesced in, actively participated in or did not object to the asserted error. State v. Bomar, 2008 MT 91, ¶ 33, 342 Mont. 281, 182 P.3d 47, citing State v. Smith, 2005 MT 18, ¶ 10, 325 Mont. 374, 106 P.3d 553.

Manywhitehorses theorizes that the prosecutor introduced these photographs to undermine its recommendation of 20 years for the tampering with evidence conviction. The photographs, however, were just as relevant to Manywhitehorses' negligent homicide conviction and clearly demonstrated why no one could definitively determine a cause of death. The photographs also shed some light on Manywhitehorses' character since the photographs documented the impact of her decision to hide her dead son's body in the trunk of her car for several months while she and her daughter continued to drive around in the car.

Manywhitehorses further alleges the State inappropriately referenced how her conduct impacted her daughter, C.M. Once again, Manywhitehorses did not object to the testimony related to C.M. (Sent. Tr. at 17-18, 30-32.) Even if she had objected, however, the evidence was admissible. When Manywhitehorses made the decision to deny her son the medical treatment he desperately needed, she also greatly impacted the life of her other child, C.M., who must forever live with the consequences of her mother's decision not to call for help when J.M. was in distress.

It was appropriate for the prosecutor to comment on, and the court to consider, the impact that Manywhitehorses' decisions had on C.M., especially when Manywhitehorses had her daughter act as a lookout when she secreted J.M.'s dead body in the trunk of her car, and when she enlisted C.M. to help her find a good spot to bury her brother and, when that was unsuccessful, when she subjected C.M. to the trauma of driving all around the state in the car with her dead brother's body rotting in the trunk. The State appropriately referenced these matters in support of its 100-year sentencing recommendation for the negligent homicide conviction.

Manywhitehorses also alleges it was a violation of the plea agreement for the State to provide testimony about her defrauding the federal government by continuing to collect her son's SSI checks after his death. As this Court indicated

in Hill, a sentencing court may consider any relevant evidence relating to the character of the defendant, her history, her mental and physical condition, and the broad spectrum of incidents making up her background. This includes other acts, even those which are dismissed pursuant to a plea agreement. Hill, 2009 MT 134, ¶ 31, citing Mason, 2003 MT 371, ¶¶ 23-25. Manywhitehorses' willingness to continue to reap the benefit of her son's SSI checks, while his body deteriorated in the trunk of her car, is part of the nature and circumstances of the crime and relevant to Manywhitehorses' character. See Bartosh, 2007 MT 59, ¶ 21, citing State v. Mason, 2003 MT 371, ¶ 23.

In sum, Manywhitehorses wrote the story that unfolded at the sentencing hearing. The prosecutor did not breach the plea agreement by telling the story.

CONCLUSION

The State respectfully requests that this Court conclude the State did not breach the oral plea agreement at the sentencing hearing, and that it uphold Manywhitehorses convictions for negligent homicide and tampering with evidence, as well as the sentence the district court imposed.

Respectfully submitted this 10th day of June, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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